Supreme Court, U.S.
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No. 98-1246

In The

Supreme Court of the United States

October Term, 1998

JILL GRAY,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, DELMAS ALLEN, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND ROSALIE JENSEN, IN BOTH HER OFFICIAL AND INDIVIDUAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

Whether a faculty member in a State university system that awards tenure only through a formal, written process achieves *de facto* tenure (1) if she fails to complete that process, but remains employed one year beyond the probationary period specified in the written procedure, and (2) by virtue of the verbal statements of one individual who lacks final authority to grant tenure.

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

Petitioner Jill Gray was hired by the Board of Regents of the University System of Georgia as an assistant professor in the Mathematics and Computer Science Department at North Georgia College, now North Georgia College and State University, in September, 1985. She came to the job with a B.A. and M.A. in philosophy and little teaching experience.

As a non-tenured assistant professor, Ms. Gray was employed pursuant to a series of one-year contracts until her non-renewal, which followed her failure to complete successfully the Board of Regents' formal tenure review process. Each employment contract contained the following provisions:

> I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD OF REGENTS ON BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME. . . .
>
> I HEREBY ACKNOWLEDGE THAT THIS CONTRACT AND THE ATTACHED EXHIBIT 'A' CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SHALL NOT BE CHANGED, MODIFIED, AMENDED, WAIVED OR DISCHARGED EXCEPT BY AN INSTRUMENT IN WRITING SIGNED BY THE PARTIES HERETO.

Section 803.09(D) of the Board of Regents Policy Manual, as well as Administrative Memoranda from the college and its faculty handbook, state that all tenure decisions are subject to final approval by the Board of Regents:

> Tenure may be awarded upon recommendation by the president and approval by the Board of Regents, upon completion of a probationary period of at least five years of full-time service at the rank of assistant professor or higher.

(Petition for Cert., pp. 60a-61a). Section 803.09(F) of the Board of Regents Policy Manual states in pertinent part:

> The maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, provided, however, that a terminal contract for an eighth year may be proffered if an institutional recommendation for tenure is not approved by the Board of Regents.

(Petition for Cert., pp. 62a-63a). Ms. Gray testified in deposition that she had been aware of these policies since 1989.

North Georgia College has in place formal procedures and criteria for tenure. The three main criteria for tenure are excellence in teaching, service and academic achievement and professional growth. Each year, faculty who are eligible for tenure and choose to apply may submit a dossier and document file, the contents of which are specified by the College, to their department heads. The Department Head forwards the materials to the

Department Promotion and Tenure Committee, which interviews the applicant, deliberates, and returns the materials to the Department Head with its written recommendation. The Department Head adds his own statement, and forwards the materials to the Vice President of Academic Affairs. The materials then go to the Institutional Promotion and Tenure Committee, which reviews them and makes a recommendation to the Vice President of Academic Affairs. The Vice President adds his own recommendation and forwards the materials to the College President for his consideration. The President's recommendations are forwarded to the Chancellor of the Board of Regents, whose own recommendations are sent to the Board for final approval of tenure.

Ms. Gray first applied for tenure during the 1989-90 academic year. On the recommendation of Dr. Delmas Allen, who was then Vice President for Academic Affairs, she withdrew her application. Dr. Allen advised her that she should seek a Ph.D. in mathematics, computer science, or some other closely related field before applying for tenure.

After teaching at North Georgia College for seven years, Ms. Gray was granted a leave of absence during the 1992-93 academic year to pursue her graduate studies full-time at the University of Georgia in Athens, Georgia. Ms. Gray taught no classes during that year but was paid half her salary and also received financial assistance from the Board of Regents to help pay her tuition.

Ms. Gray returned to full-time teaching at North Georgia College under an eighth contract for the 1993-94 academic year. During that year, Ms. Gray again applied

for tenure. In September, 1993, Ms. Gray was advised by the College that any contract she received for the 1994-95 academic year would be her final contract if she did not attain tenured status during the current year.

Ms. Gray's department head, Dr. Rosalie Jensen, did not recommend Ms. Gray for tenure based on Ms. Gray's below average teaching evaluations and student complaints about Gray that both she and Dr. Allen had received. The Promotion and Tenure Committee of the Mathematics and Computer Science Department, however, did recommend that Ms. Gray be awarded tenure. The departmental committee's decision was made prior to receipt of a letter to Dr. Allen from Ms. Gray's major professor at the University of Georgia, which indicated that it would take Gray approximately four more years, one of them as a full-time student, to complete her Ph.D. The departmental committee's recommendation was forwarded to the Institutional Promotions and Tenure Committee for consideration, which recommended, in a four-one vote, not to award Ms. Gray tenure.

Dr. Allen, President of North Georgia College since summer, 1993, advised Ms. Gray of his concurrence with the Institutional Promotions and Tenure Committee in a letter dated January 25, 1994. Ms. Gray did not appeal Dr. Allen's decision to the Board of Regents.

In May, 1994, Ms. Gray received and signed a contract for her ninth year of teaching at North Georgia College, marked "final contract." She served part of her contract for the 1994-95 academic year, and went on extended sick leave in January, 1995, until her contract expired in June, 1995.

In her Complaint, Ms. Gray alleged that Dr. Allen "repeatedly assured Plaintiff that tenure would be granted after she returned to Defendant college [from her leave of absence in 1993-94]." Ms. Gray made similar assertions in her Petition to this Court. (Petition for Cert., pp. 4, 8). Dr. Allen denied promising Ms. Gray tenure. In any event, each contract between Gray and the Board of Regents expressly negates any such promise or assurance by Dr. Allen.

Dr. Allen also gave deposition testimony that,

> My interpretation [of the Board of Regents Policies] is that if a faculty member is here without applying for tenure and resides or isn't picked up within seven years and there's been no break in time, yes, they're entitled to automatic tenure.

However, Ms. Gray was never treated or regarded as tenured by North Georgia College or the Board of Regents. The Board of Regents has never awarded tenure to a faculty member on the basis that he or she had been employed for more than seven years as a non-tenured professor, or on any other basis outside its formal, written procedures.

Now Ms. Gray petitions this Court to grant certiorari to review the order of the Eleventh Circuit Court of Appeals affirming summary judgment for the Board of Regents on Gray's claim of denial of procedural due process. She specifically complains that the Board refused to provide her a hearing before her release from employment when she failed to achieve tenure through Regents' formal tenure procedure. The Court of Appeals ruled that

Ms. Gray had no property right to continued employment, as she had not attained tenure, *de facto* or otherwise, at the time of her nonrenewal.

II. REASONS FOR NOT GRANTING THE WRIT

The Court of Appeals based its decision squarely on *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), two durable and far-reaching precedents that established the now settled law of procedural due process in the academic setting. The breadth of these two cases is sufficient to encompass the myriad factual situations that occur within the tenure review processes of academia, as well as a host of other contexts, as evidenced by the fact that they are relied upon in every case cited by Petitioner in her Petition for Certiorari.

A. The Court of Appeals decision is a restatement of the law of procedural due process as established in *Board of Regents v. Roth* and *Perry v. Sindermann*.

The reasoning and language of *Roth* and *Perry* have repeatedly provided sufficient guidance to the federal courts to review and decide procedural due process issues in academic employment cases. Likewise, *Roth* and *Perry* provided the Eleventh Circuit Court of Appeals with sufficient basis to decide Ms. Gray's case, the result being a well-reasoned order based on sound law. Because the law in *Roth* and *Perry* is clear, straightforward and easy to apply, there is no reason to grant certiorari in this

case, which simply illustrates a proper application by a circuit court of binding Supreme Court precedents.

Roth was employed on a year-to-year basis at Wisconsin State University at Oshkosh. He challenged the nonrenewal of his notice of appointment, the equivalent of an employment contract at his institution, after one year, on procedural due process grounds. The Supreme Court held that Roth had no constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year. 408 U.S. at 569.

Ruling that Roth had no property interest protected by the due process clause of the Fourteenth Amendment, the Court explained, "[T]he range of interests protected by procedural due process is not infinite." *Id.* at 570. This is despite the "broad and majestic" nature of the term property, which is "among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience." *Id.* at 571. The Court went on to hold, "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Id.* at 576. In often-quoted language, the Court continued,

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . .
>
> Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

> understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577.

Perry v. Sindermann gave the Court an opportunity to flesh out the precepts established in *Roth*. Professor Sindermann taught for ten years at Odessa Junior College before his contract was not renewed without a hearing. Written policy at the College declared that there was no tenure system, but that "[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure" so long as he cooperates with his department and the administration and is "happy in his work." 408 U.S. at 600. This policy was consistent with that of the Coordinating Board of the Texas College and University System, which provided for tenure after a probationary period of seven years in the System, with specific tenure procedures to be set forth by each institution. *Id.*

The Court remanded the case for a determination of Sindermann's rights under Texas contract law. It cited *Roth* to establish that Sindermann may have had a property right in continued employment in the form of *de facto* tenure, since his college lacked a formal tenure process. The Court contemplated the possibility that, in the absence of an express contract created by written tenure provisions evidencing a teacher's claim of entitlement to continued employment in the form of tenure, an implied contract may be in place under state law that would supplement other agreements and support the teacher's claim to a property interest in tenure. 408 U.S. at 602, n. 7.

The Court referred to "an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure[,]" which

> is particularly likely in a college or university, like Odessa Junior College, that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice.

Id. at 602.

Judge Edmondson's decision in the instant case flows directly from the language and import of *Perry* and *Roth*. The decision of the Court of Appeals differentiated Ms. Gray's situation from that of Professor Sindermann by emphasizing that the Board of Regents had a formal tenure procedure which was the only way any faculty member had ever achieved tenure; that is, Regents institutions, including North Georgia College, had no "common law" tenure. This holding was despite the deposition testimony of President Allen that his interpretation of Regents' policy was that "automatic tenure" could be conferred on a faculty member who "is here without applying for tenure and resides or isn't picked up within seven years."[1] (Petition for Cert., p. 11a). The Court properly held,

> [A]s a matter of law, one administrator's stated 'interpretation' of the Board of Regents Policy

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[1] In fact, Ms. Gray had applied for tenure through the formal tenure review process twice, in the 1989-90 academic year, and in the 1993-94 academic year, when her application was denied by the Institutional Tenure and Promotion Review Committee. President Allen concurred in the denial, and Ms. Gray filed no appeal to the Board of Regents.

> Manual – an interpretation not based on concrete experience with someone actually getting tenure by default – cannot rise to the level of 'common law' of the university that Sindermann demands.

(Petition for Cert., p. 12a).

The court likewise dismissed Ms. Gray's argument that any assurances Allen may have made about Ms. Gray's progression toward tenure by taking courses at the University of Georgia created a property interest. (Petition for Cert., p. 12a, n. 9).

The facts remain that no faculty member at North Georgia College or elsewhere in the Regents System had ever achieved tenure through any other means than successful completion of the formal tenure review process, and that Ms. Gray was never treated or regarded as if she had achieved tenure. *Cf. Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) (holding that a faculty member who was prohibited by state statute from getting formal tenure had a property right in continued employment in the nature of tenure, where evidence showed he had been regarded and treated by University authorities as if he were tenured).

The Court of Appeals dismissed the proposal that Ms. Gray had been awarded tenure by the grant of an eighth-year contract by citing the language of the contract itself, which specified,

> I UNDERSTAND THAT AT THE EXPIRATION OF THE TERM OF THIS CONTRACT I WILL NOT BE REEMPLOYED UNLESS THERE IS A NEW AND SEPARATE OFFER BY THE BOARD

OF REGENTS ON BEHALF OF NORTH GEORGIA COLLEGE AND ACCEPTANCE THEREOF BY ME.

The court recognized the identity between Ms. Gray's employment contract and that of Roth, holding that, under the Supreme Court's decision in *Roth*, any property interest Ms. Gray was asserting in continued employment had to be created by the terms of the contract under state law, which clearly secured no interest in further employment, i.e., tenure.[2]

The Court of Appeals went on to hold that, in light of the language of the contracts between Ms. Gray and Regents, which specified that they were subject to Regents' Policies and could not be altered except in writing, getting an eighth-year contract was not the same as getting tenure or its equivalent. Regents' Policy, the North Georgia College faculty handbook and Administrative Memoranda specify that tenure is to be awarded upon approval of the Board of Regents. Section 803.09(D), Board of Regents Policy Manual (Petition for Cert., pp. 60a-61a). Regents' Policy provides that the maximum time that may be served at the rank of assistant professor or above without the award of tenure shall be seven years, except that an eighth-year contract may be proffered if an institutional recommendation for tenure is

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[2] As for the implied contract theory of *Perry v. Sindermann*, Georgia law holds that, while the State has waived sovereign immunity as to express contracts, it maintains its immunity as to implied contracts. *Board of Regents v. Tyson*, 404 S.E.2d 557 (Ga. 1991); *Culberson v. Fulton-DeKalb Hospital Authority*, 411 S.E.2d 75 (Ga. Ct. App. 1991). Therefore, the Board of Regents, an arm of the State of Georgia, cannot be bound by an implied contract.

disapproved by the Board of Regents. Board of Regents Policy Manual, 803.09 (F) (Petition for Cert., pp. 62a-63a). The Eleventh Circuit Court of Appeals quoted the Fifth Circuit's decision in *Staheli v. University of Mississippi*:

> The institution of a tenure system has an inexorable internal logic: the very existence of a tenure system means that those teachers without tenure are not assured of continuing employment.

854 F.2d 121, 124 (5th Cir. 1988).

The Court of Appeals wisely refused to twist that logic to conclude that the Board of Regents' failure to expressly rule out automatic tenure meant that it had conferred such status on Ms. Gray.

B. There is no conflict among the circuits on the question of *de facto* tenure, and any apparent conflict is inconsequential to the case *sub judice*.

What Petitioner characterizes as a circuit split on the question of *de facto* tenure is more aptly characterized as the variety of outcomes in the lower courts of applying settled law to the myriad factual situations that arise in colleges and universities as they employ their tenure procedures, formal or informal. In fact, all the cases cited in the Petition for Certiorari (pp. 14-15) lend support to the decision of the Court of Appeals in *Gray* and, like the *Gray* decision, are based on the law of procedural due process established in *Roth* and *Perry*.

Soni v. Board of Trustees stands out as the one case in which a court found that a faculty member at an institution that had a formal written tenure process nonetheless

had a property right in continued employment. What differentiates *Soni* from the other tenure cases is the strength of its facts: Dr. Soni literally was tenured, *de facto*. He was not permitted to have formal tenure under a Tennessee law and a University regulation that prohibited aliens from holding positions that were not classified temporary in any state school system. 513 F.2d at 349. He was informed of the law when he became eligible for tenure review, but was assured that he had permanent employment. He was permitted to participate in the University's retirement program, which was restricted to permanent faculty. *Id.* He attended departmental meetings and voted on tenure for other faculty members. *Id.* at 350. Dr. Soni's colleagues and his department head assured him that he would be regarded as tenured, and they treated him as tenured. Dr. Soni functioned as a tenured professor in every aspect, and was convinced by objective evidence that his lack of formal tenure was due only to the technicality of the state law. When he became a citizen and was denied formal tenure, the Sixth Circuit Court recognized his property right in continued employment based on the compelling facts of his case.

The nature of the property interest recognized in *Soni* exemplifies the description of property provided by the Supreme Court in *Roth*: "the security of interests *that a person has already acquired* in specific benefits." 408 U.S. at 576 (emphasis added). That Dr. Soni had already acquired a legitimate and objective expectation in continued employment with the University is evidenced by the indicia of tenure he enjoyed – participation in the retirement program for permanent faculty and voting rights in the department – and by his reliance on his permanent status:

he had purchased a home near the University. 513 F.2d at 350. ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 577.) Ms. Gray did not show that she had either acquired any indicia of tenure to support her assertion of a property interest in tenure at North Georgia College, nor did she show reliance on the *de facto* tenured status she alleged.

The Sixth Circuit cited the compelling facts of *Soni* to distinguish it from *Edinger v. Board of Regents*, 906 F.2d 1136 (6th Cir. 1990), cited by the Court of Appeals as support for its decision below. (Petition for Cert., p. 12a, n. 8). Although *Edinger* is cited in the Petition for Certiorari as in conflict with *Soni*, and is factually very different from *Soni*, the cases are legally consistent.

Dr. Edinger taught at Morehead State University for a total of eight years. University policy, like Regents' policy in the instant case, provided for a probationary period of not "more than five years" before its Board of Regents "may grant tenure." *Id.* at 1137. Each employment contract, as well as state law, provided that the grant of tenure was "subject to approval by the Board of Regents." *Id.* At the beginning of his fourth year, Dr. Edinger was given a terminal contract, after which he brought a lawsuit concerning his failure to be rehired for a fifth year. The lawsuit resulted in a settlement agreement under which Dr. Edinger was given another contract and promoted to full professor, but not granted tenure, although the two customarily occurred simultaneously. Dr. Edinger's sixth-year contract was erroneously marked "tenured." *Id.* at 1138. In the district court, Dr. Edinger

claimed that he had in fact been granted formal tenure, that he had "tenure by ratification" due to employment beyond the probationary period, and that he had *de facto* tenure under *Perry v. Sindermann*.

Dr. Edinger's first two theories failed, as did his argument for *de facto* tenure, with the court differentiating Dr. Edinger's case from *Perry v. Sindermann* on the basis of the existence of a formal tenure process at Morehead State University. Holding that Dr. Edinger's reliance on *Soni* was misplaced, the Sixth Circuit court quoted *Haimowitz v. University of Nevada* for the proposition that, "[T]he existence of a formal code governing the granting of tenure precludes a reasonable expectation of continued employment absent extraordinary circumstances." 579 F.2d 526, 528 (9th Cir. 1978) (denying a claim to *de facto* tenure based on assurances of the plaintiff's colleagues that he was progressing well towards tenure, and distinguishing *Soni* on its facts.)[3] 906 F.2d at 1140.

The *Edinger* court discussed the "extraordinary circumstances" of Dr. Soni's case, as outlined above, and denied Dr. Edinger's claim to *de facto* tenure. The court pointed out that Dr. Soni had been recommended for a permanent faculty position, but that a formal vote had been deferred until he had obtained citizenship. He had been promoted from a visiting associate professor to an

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[3] The *Haimowitz* court held, "The entire thrust of formal tenure provisions is to standardize the process of faculty selection and employment security. In other words, formal tenure regulations are designed to avoid the *de facto* tenure problems recognized in *Perry*." *Id.*

associate professor[4] and given the prerequisites of tenure: participation in the retirement program for permanent faculty, inclusion in departmental meetings, and a vote on tenure for other faculty. Dr. Soni had been told repeatedly that once he obtained citizenship, he would get formal tenure. *Id.* In contrasting *Edinger* with *Soni*, the court commented, "[F]or all practical purposes Dr. Soni functioned as a tenured professor, was viewed as such by his colleagues, and was told that formal tenure was forthcoming." *Id. Soni* and *Edinger* are clearly distinguishable on their facts and do not illustrate a circuit split.

Jones v. University of Central Oklahoma, 13 F.3d 361 (10th Cir. 1993), is also cited by Petitioner to show a purported split among the circuits on the issue of *de facto* tenure. The *Jones* court indeed discerned "two general schools of thought" among the circuits as to *de facto* tenure. *Id.* at 363. However, in its discussion of *Soni* and *Haimowitz* as representative of each school, the court concluded that both were flawed by their failure to "define protectable property interests in the state-employment context solely through the application of state law." *Id.*[5]

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[4] Dr. Edinger's attempt to bolster his claim to *de facto* tenure by arguing that he, too, had been promoted was disallowed by the Sixth Circuit court, which recognized that the promotion was ordered by the court in his previous lawsuit against the Morehead State Board of Regents, and that the settlement agreement did not mention tenure. *Id.*

[5] The *Jones* court cites *Perry* at 602, n. 7, to support its rigid premise that the federal courts are to define property interests in state employment *"solely through the application of state law"* specifically tailored to tenure. 13 F.3d at 363, 365 (emphasis added). However, note 7 refers to *Roth's* more expansive holding that property interests are created by "existing rules or

Declining to adopt either school of thought, the court remanded for a determination of state contract and employment law as they bear on the issue of *de facto* tenure, going even further to suggest that states could simply pass laws specifically addressing implied contracts in the context of tenure in their universities. 13 F.3d at 365.

Even if the Tenth Circuit court correctly identified a split among the circuits on *de facto* tenure, it is inconsequential to the case *sub judice*. The outcome – that Ms. Gray did not have *de facto* tenure – is the same under the analysis set forth in *Roth* and *Perry* and followed in the cases discussed herein, and under the strict state law analysis advanced in *Jones*: The *Gray* court looked to state law regarding "something very much like 'tenure' " in Georgia's public school system for elementary and secondary school teachers in applying the *Roth* analysis to Ms. Gray's facts. (Petition for Cert., p. 8a). *See also* n. 2, *supra*.[6] Such a split, if it does exist, is not an adequate basis upon which to grant certiorari.

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understandings that stem from an independent source *such as state law* – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577 (emphasis added).

[6] Moreover, even if the analyses applied by the circuit courts were not true to the holding of *Roth* concerning the role of state law, the United States Supreme Court has long held, "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 245 (1937).

Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972), is also ineffective to show a circuit split on the question of a property interest in *de facto* tenure. The case concerned a public school teacher whose contract was not renewed after twenty-nine years of employment. The matter was decided by the district court before *Roth* and *Perry v. Sindermann* were handed down, and decided by the Court of Appeals in light of the two new Supreme Court pronouncements. *Id.* at 179. The Fourth Circuit Court reversed the district court's dismissal, finding simply that the plaintiff had stated a cause of action on the Fourteenth Amendment's Due Process Clause. *Id.* at 182-183. Neither *Johnson*, nor any of the other cases discussed herein or cited in the Petition, show a split among the circuits that calls for review by this Court.

III. CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of certiorari as the decision below is merely a restatement and fact-specific application of the law of procedural due process as established in *Board of Regents v. Roth* and *Perry v. Sindermann*, and there is no split

among the circuits on the issue of *de facto* tenure such as to require review by this Court.

Respectfully submitted,

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